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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-816

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
United States Department of Labor

and

TERRY M. CROSS, JR.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A) is not yet reported. The decision of the Benefits Review Board of the Department of Labor (Pet. App. B) is reported at

7 BRBS 10. The Opinion and Order of the Administrative Law Judge of the Office of Workers' Compensation (Pet. App. C) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1979. No petition for rehearing was filed with that court. The petition for a writ of certiorari was filed with this court on November 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an employee covered by the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901, *et seq.*, who suffers a loss in wage earning capacity as defined in the Act as a result of an injury to his knee, is entitled to compensation pursuant to 33 U.S.C. § 908 (c)(21), based upon that loss of wage earning capacity.

STATUTE INVOLVED

The statutory provision involved is the Federal Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901, *et seq.* The relevant statutory provisions are set forth in Petitioner's Statutory Appendix at 1a-4a.

STATEMENT

Respondent Terry M. Cross ("Cross") is and was a Class A cable splicer for Petitioner, Potomac Electric Power Company, ("PEPCO"). In an accidental injury arising out of and in the course of his employment, Cross injured his left knee, resulting in a tear of the medial miniscus (fibrocartilage) of that knee and necessitating the surgical removal of the medial miniscus.

After the surgery, Cross was able to return to light duty status but, because of the continuing pain, discomfort, swelling and buckling in his knee, was unable to perform the rugged duties of a Class A cable splicer. His light duty status was imposed by the Medical Director of PEPCO. He accordingly has been denied both in grade wage raises and overtime work.

The Administrative Law Judge of the Office of Workers' Compensation found that Cross was permanently partially disabled, that he suffered a loss in wage earning capacity, and that he was entitled to compensation under 33 U.S.C. § 908(c)(21). That decision was affirmed by both the Benefits Review Board and the Court of Appeals.

ARGUMENT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS

The Court of Appeals below held that where an employee sustains an injury to an anatomical member listed in the scheduled loss provisions of 33 U.S.C. § 908 (c)(1)-(20) which results in an identifiable loss of wage earning capacity, he is entitled to receive workmen's compensation benefits under the provisions of 33 U.S.C. § 908(c)(21). That decision is in complete accord with the decisions of the Benefits Review Board which has considered that issue, *Mann v. Old Dominion Steering Corp.*, 1 BRBS 357 (1975); *Longo v. Universal Terminal & Stevedoring Corp.*, 2 BRBS 357 (1975), and with the rationale behind the opinions of *American Mutual Insurance Co. of Boston v. Jones* 138 U.S. App. D.C. 269, 426 F.2d 1263 (1970) and *Jacksonville Shipyards, Inc., v. Dugger*, 587 F.2d 197 (5th Cir. 1979).

Petitioner relies on *Williams v. Donovan*, 234 F.Supp. 135 (E.D.La. 1964), affirmed *per curiam* 367 F.2d 825

(5th Cir. 1966), *cert. denied* 386 U.S. 977. The Fifth Circuit opinion affirming the District Court did not address the issue of exclusivity and it is unclear from the short opinion whether that issue was even before the Court of Appeals. The focus of the Court's affirmance is on the issue of total as opposed to partial disability. In any case, the Fifth Circuit's adoption of the *American Mutual Insurance Company of Boston v. Jones*, *supra*, rationale, casts considerable doubt as to the continued viability of the District Court's opinion in *Williams* on the issue of exclusivity even in the Fifth Circuit. It is clear that for the last ten years, every decision on the issue of exclusivity has been in accord with the opinion below and has rejected or distinguished the district court's opinion in *Williams*. It is unnecessary for this Court to go further.

II.

THIS IS NOT AN ISSUE SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S CONSIDERATION

The Petitioner places great significance on the fact that this Act has never been interpreted by a Court in this manner. The flaw in that argument is that in the entire history of the Act, this issue has apparently only arisen in two cases, the instant case and in *Williams*, *supra*. Furthermore, this exact issue has apparently been addressed by the Benefits Review Board only three times: the instant case, *Longo v. Universal Terminal & Stevedoring Corp.*, *supra*, and *Mann v. Old Dominion Stevedoring Corp.*, *supra*. Not only has this provision been interpreted consistently for over the last ten years, but it is also an issue which appears to be of little widespread relevance and of limited frequency. There is no need for this Court's consideration for an issue both well settled and rare.

III.

THE OPINION BELOW IS CONSISTENT WITH THE STATUTE

As pointed out in the majority opinion, the holding below is consistent with both the intent of Congress and the clear distinction the statute has drawn between a physical injury and an economic disability. Pet. App. A at 9a-11a. Petitioner cites a proposed amendment to 33 U.S.C. § 908(c) which would have given an employee both the benefits under the scheduled loss provision, based on total compensation, and then a continuing benefit under section 908(c)(21), based on loss of wage earning capacity. Petition for Writ of Certiorari n.4 at 7 and accompanying text. Petitioner asserts that this amendment would have codified the result below in this case but was not reported out of Committee and thus was rejected by Congress. However, the opinion below recognizes that the scheduled loss provisions create a benefit floor based on income, but that an employee who suffered a loss of earning capacity would recover for that lost earning capacity. The employee can receive benefits based on one or the other formula, but not both. The proposed amendment would have allowed the employee to receive both benefits successively. It is that provision which Congress rejected, not the result below.

CONCLUSION

On the basis of the foregoing, Respondent Terry M. Cross, Jr., respectfully suggests that the writ of certiorari should not be granted.

Respectfully submitted,

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